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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DONALD HOVANESIAN et al., Plaintiffs and Appellants, v. CHRISTOPHER COUVEAU et al., Defendants and Respondents.	B209445 (Super. Ct. No. EC043258)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles W. Stoll, Judge. Affirmed.

Leist Law Group, Jeffrey J. Leist and David A. Meyers for Plaintiffs and Appellants.

June Babiracki Barlow and Neil D. Kalin for California Association of Realtors® as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richardson & Harman and Richard C. Moore for Defendants and Respondents.

Appellants Donald and Ani Hovanesian timely appealed the judgment entered against them after a bench trial concerning a contract dispute. The trial court found that appellant's assignor had repudiated a real estate sales contract, thus relieving respondent sellers of their duty to perform under the contract. Appellants challenge the court's finding of a repudiation and the award of attorneys' fees to respondents. We affirm.

FACTUAL BACKGROUND

Charles Pierson contracted to purchase a residential property owned by respondents Christopher and Lynn Couveau. Pierson eventually assigned his rights under the contract to appellants Donald and Ani Hovanesian. Real estate agent Gary Nicholson represented Pierson until the assignment was made. After the assignment, Nicholson represented appellants.

On June 20, 2006, Nicholson, on behalf of "'CHARLES PIERSON or Assignee,'" offered to purchase a property owned by respondents. Two days later on June 22, the Couveaus accepted the offer. The offer and acceptance were effected using a form contract prepared by the California Association of Realtors (C.A.R.) titled "California Residential Purchase Agreement And Joint Escrow Instructions." The form contains various boxes that can be checked off to make the agreement contingent on certain specified events occurring. In this case, Pierson checked sections of paragraph 2J, which made the agreement contingent upon the subject property being appraised at a value "no less than the specified purchase price." The specified purchase price was $750,000.

On June 27, five days after respondents accepted the offer from Pierson, a second offer to purchase was made by Stoney Landers. This offer was for $859,000. Respondents were advised at that time by their agents that they were bound by the existing contract with Pierson.

On July 3, Nicholson received an appraisal report that valued the subject property at $720,000, not the specified price of $750,000. Nicholson then wrote a letter to respondents' agents telling them that the property had been appraised at $720,000, and that Pierson was "ready to go forward with the transaction but only at the appraised value." The letter closed by saying, "Kindly let me know the seller's decision by July 7th." Nicholson was informed on the same day that respondents were not going to sell the property for $720,000.

Believing that they were no longer bound by the original agreement with Pierson, respondents made a counter offer to Landers on July 7. The counter offer specified a purchase price of $859,000, as originally proposed by Landers, but also included a handwritten provision that made the sale "subject to cancellation of previous escrow." Landers accepted the offer on July 11.

By July 10, Nicholson had learned that respondents had another buyer, and that the agreed selling price was $859,000. By letter to respondents' agents, Nicholson said that Pierson was assigning his rights under the original contract to appellants. Nicholson also indicated that he expected the original deal to "close on time with the assignee chosen today." The Hovanesians alleged they had received a new appraisal report fixing the value of the subject property at $750,000 on July 11.

Respondents did not conclude a sale with appellants, but instead conveyed the property to Landers.

DISCUSSION

I. Standard of Review

Concerning appellants' contract issues, the contract and other writings in this case may be interpreted without resort to extrinsic evidence. The determinative facts have been stipulated by the parties. Accordingly, the judgment of the trial court will be reviewed de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.)

II. Disaffirmation of the Contract

Nicholson's July 3 letter states that his client is ready to go forward, "but only at the appraised value" of $720,00. This statement is a clear, positive, and unequivocal indication that the buyer did not intend to proceed with the transaction under the agreed terms, which set the price at $750,000. Appellants argue that Nicholson intended that the letter be a request to lower the price and that respondents could either accept or reject the request at their discretion. The tough language, argue appellants, was mere posturing. We disagree. It is impossible to know Nicholson's subjective intent at the time he drafted this letter, but when viewed objectively, the language compels the conclusion it was not a request for modification.

A. Option

The trial court was correct when it applied *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49 to the present case. *Beverly Way* presents similar facts. There, a contract to purchase an apartment building made buyer's duty to perform conditional upon buyer approving a property survey. (*Id.*, at p. 52.) After receiving the survey, buyer sent a letter to seller stating, "'We reluctantly disapprove of the matters disclosed on the Survey. . . .'" (*Id.*, at p. 53.) In the letter, buyer also proposed other terms that might "'keep the deal alive.'" (*Ibid.*) There was no further communication between buyer and seller until two months later, when buyer sent a second letter to seller stating that buyer would waive objections to the survey and proceed with the sale. (*Ibid.*) Seller was no longer interested in proceeding and canceled the escrow, and buyer sued for breach of contract. (*Id.*, at pp. 53-54.)

On appeal, the court concluded that the buyer's option to cancel the contract based on disapproval of the survey was a condition precedent under Civil Code section 1436. (*Beverly Way*, *supra*, 226 Cal.App.3d at p. 54.) Further, the court held that where a party has the power to approve or disapprove a condition precedent, that power should be

treated under the law as a formal option. (*Id.*, at p. 55.) The right to exercise an option is lost once it is rejected, even if a later attempt at exercising occurs within the original time prescribed for it. (*Id.*, at pp. 55-56.) We are persuaded that this interpretation is correct, and further, that it applies in the current case as well.

Here, Pierson had a contractual right to terminate the contract if the appraised value of the subject property did not meet or exceed the contract price, or he could have waived the appraisal requirement, all at his discretion. This contractual provision is substantially similar to the condition in *Beverly Way*. By Nicholson's letter of July 3, Pierson exercised his power to cancel the contract. Once this right was exercised, the right to instead waive the appraisal and proceed with the sale was also terminated and could not be resurrected by either Pierson or his subsequent assignees. The trial court's application of *Beverly Way* was proper, and accordingly, the judgment below should not be disturbed.

B. The Role of C.A.R. Forms in this Transaction

As appellants point out in their brief, Pierson, as of July 3, would have been within his rights to make a request for modification under the terms of the contract. As an experienced real estate agent, Nicholson should have been aware that C.A.R. has prepared a form titled "Request for Repair" (form RR) to achieve this very purpose. Although the name of the form may seem misleading to the uninitiated, the form is intended by C.A.R. to be used by buyers to make post-agreement requests for both property repairs and price modifications. Section 1 of form RR, fittingly labeled "Buyer Request," provides an area where the buyer may list requests for the seller to consider. Section 2 ("Seller Response to Buyer Request") allows the seller to accept, reject, or make counter proposals. Had this form been used, there would have been no doubt about whether Nicholson was requesting a modification or repudiating the contract. That is not to say that the only acceptable way to request modifications is by using pre-approved

C.A.R. forms, but when parties or their agents take it upon themselves to draft their own documents, potentially unintended consequences such as arose here are an inherent risk.

III. Award of Fees

There is no attorney's fee award in the record and appellants only appealed from the judgment. Appellants claim that although no formal order was issued, the court granted respondents' motion for an award of attorney's fees on July 11 (appellant's notice of appeal was filed on July 10). However, the judgment, while not listing the amount of attorney's fees, does state the Couveaus (respondents) are to recover attorney's fees from the Hovanesians and Pierson. Thus, we will address whether respondents were entitled to recover attorney's fees.

Appellants claim that at the conclusion of the trial, and after being briefed on the issues, the trial court awarded attorney's fees to respondents based on paragraphs 22 and 17A of the sales contract. Paragraph 22 states that the prevailing party will be entitled to attorney's fees unless that party does not comply with Paragraph 17A. Paragraph 17A requires the parties to mediate any disputes before proceeding to arbitration or court action. The parties here do not disagree about the meaning of these paragraphs, but instead, disagree about whether respondents have met their obligations under paragraph 17A. We review disputes involving attorney's fees for abuse of discretion. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.) Under this standard, an appellate court will interfere with a trial court's discretion only if it concludes that under the circumstances, viewed most favorably in support of the trial court's actions, no judge could have reasonably reached the challenged result. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.) Here, we conclude that the trial court acted within its discretion.

Appellants contend that respondents refused appellants' invitations to mediate. The supporting documents filed with the parties' post-trial briefs paint a different picture. On July 26, 2006, counsel for appellants requested that the parties mediate their dispute, as required by paragraph 17A of the original sales contract. Respondents answered on

August 3, informing appellants that "[o]ur clients are amenable to mediate this dispute, however, we are not sure what there is to mediate." On August 25, respondents suggested to appellants a specific retired judge who could be hired to mediate the dispute. On September 6, respondents again reminded appellants of the retired judge that respondents had recommended previously. On September 19, respondents asked that appellants contact them to discuss selection of an arbitration service. On September 22, respondents proposed two retired judges as arbitrators and indicated that they were agreeable to a court appointed mediator. The record contains no documentary evidence of further communication between the parties concerning mediation.

Based on the exchanges between the parties outlined here, we conclude respondents did not refuse to mediate. Accordingly, the court did not abuse its discretion in awarding attorney's fees.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**